JD–61–06
Cleveland, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SAINT VINCENT CHARITY HOSPITAL
OF CLEVELAND, OHIO

and Case 8–CA–36377

THE OHIO NURSES ASSOCIATION,
a/w AMERICAN NURSES ASSOCIATION/
UNITED AMERICAN NURSES

*Cheryl Sizemore, Esq.,*
for the General Counsel.
*John N. Childs & Lisa Marie Clark, Esqs.,*
*(Brennan, Manna & Diamond, LLC),*
of Akron, Ohio, for the Respondent.
*Susan Shelko,*
of Columbus, Ohio,
for the Charging Party.

DECISION

Statement of the case

IRA SANDRON, Administrative Law Judge. The complaint stems from unfair labor practice charges filed by the Ohio Nurses Association, a/w American Nurses Association/United American Nurses (the Union) against Saint Vincent Charity Hospital of Cleveland, Ohio (Respondent or the Hospital), alleging violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in Cleveland, Ohio, on June 14, 2006, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. All parties filed helpful posthearing briefs that I have duly considered.

Issue

Has Respondent failed and refused to provide the Union with information the latter requested that is necessary and relevant to the Union's performance of its duties as exclusive collective-bargaining representative; specifically, since on October 17, 2005, and continuing to date, including on April 5, 2006, has Respondent failed and refused to provide the Union with requested information pertaining to the suspension and later discharge of bargaining-unit employee Cheryl Gorey?

Sanctions for Subpoena Noncompliance

In it answer, Respondent denied the allegations in the complaint that Gary Lazroff, vice president of human resources, has been a statutory supervisor and agent. The General

Counsel subpoenaed him, as well as his personnel file and all documents relating to this position and duties.[1]

In correspondence with the Union, Respondent contended that Gorey's suspension grievance was invalid because she had not signed it. The General Counsel subpoenaed the following: (1) a copy of the grievance concerning Gorey's 3-day suspension and all documents concerning the grievance; and (2) a copy of Gorey's personnel file.[2]

Respondent filed a petition to revoke the above subpoenas, which it chose not to make part of the record.

Subpoenaed information should be produced if it relates to any matter in question, can provide background information, or can lead to other evidence potentially relevant to an allegation in the complaint. See Board's Rules, Section 102.3(b), and *Perdue Farms*, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998). A judge may impose sanctions, including drawing adverse inferences, against a party for its refusal and failure to abide by his or her directive that it comply with a subpoena. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 398 fn. 7 (2004); *Teamsters Local 776 (Pennsy Supply, Inc.)*, 313 NLRB 1148, 1154 (1994); *Banon Mills, Inc.*,146 NLRB 611 (1964).

At the outset of the trial, I stated that the subpoenas in question satisfied this liberal standard for production, and I directed Respondent's counsel to produce Lazroff and the documents. Respondent's counsel replied that Respondent would not do so, and counsel adhered to that refusal throughout the hearing even though I offered to allow time to obtain the documents. Lazroff did not appear, and no documents were produced. I note that both Mr. Childs and Ms. Clark conceded on the record that they had not gone through Gorey's personnel file, after I asked whether it contained anything concerning the grievance.[3] They therefore were not in a position to deny the existence of a signed grievance.

Based on the record evidence, described under the facts, I find that Lazroff at all times material has been Respondent's supervisor under Section 211 and its agent under Section 213 of the Act. Accordingly, I draw an adverse inference against Respondent on any factual matters in the case about which he likely would have knowledge. See *Daikichi Sushi*, 335 NLRB 622 (2001); *International Automated Machines*, *Inc.*, 285 NLRB 1122, 1123 (1987), enfd. mem 861 F. 2d 730 (6th Cir. 1988); *Martin Luther King Sr., Nursing Center*, 231 NLRB 15 fn.1 (1977). I deem this an appropriate sanction for Respondent's failure to produce him.

As to the documents that were not produced, I conclude that the appropriate sanction is, again, drawing adverse inferences against Respondent. See *Teamsters Local 776*, supra at 1154. The underlying rationale is that a respondent that has refused to provide subpoenaed materials that are the best evidence of a fact should not be allowed to introduce secondary, less reliable, evidence of matters provable by those materials. See *Smithfield Packing Co.,* 344 NLRB No. 1, slip op. at 10 (2004); *Avondale Industries*, 329 NLRB 1064, 1244–1245 (1999); *Hedison Mfg. Co.*, 249 NLRB 791, 796 (1980); *Bannon Mills*, supra. It follows that Respondent cannot rely on its counsel's representation that that there is no signed grievance in its possession, when records that would substantiate that contention have not been produced and, in the case of Gorey's personnel file, not even reviewed by counsel.

[1] GC Exhs. 28(B), 32, & 33.
[2] GC Exhs. 31 & 34.
[3] Tr. 190.

## Facts

Two witnesses testified for the General Counsel: Kenneth Kirkpatrick, an employee of Respondent, vice-president of the Union's professional practice unit at the Hospital, and the Union's grievance chairperson; and Susan Shelko, a labor relations specialist for the Union. Both appeared candid, and their testimony was quite consistent on major points, as well as consistent with the documentary evidence of record. I credit their unrebutted testimony, taking into account the above adverse inferences that I have drawn against Respondent. Respondent called no witnesses.

The credited testimony of Kirkpatrick and Shelko, and the documents of record, establish without doubt that Lazroff was the highest level of management to uphold Gorey's suspension and the later decision to discharge her. Accordingly, I find him to be a statutory supervisor and agent of Respondent within the meaning of the Act.

Respondent, an Ohio corporation with an office and place of business in Cleveland, Ohio, is engaged in the operation of a hospital. Respondent has admitted it comes under the jurisdiction of the Act, and I so find.

At all times material, the Union has been the certified representative of a unit of Respondent's employees consisting of all registered professional nurses employed as staff nurses, and nurses holding valid interim permits. The 2001 -2004 collective-bargaining agreement was in effect at the time of Gorey's suspension.[4]

On September 9, 2003, Respondent held an employee counseling session with Gorey, in Lazroff's office. Lazroff and Margaret Kunsman, Gorey's immediate supervisor, attended for management. Kunsman reviewed Gorey's alleged misconduct, as reflected in the memo of employee counseling session.[5] According to Kunsman, on August 22, 2003, Gorey paged her at 3:30 p.m., requesting to work overtime; Kunsman denied the request but Gorey went ahead and did so. Kunsman accused her of demonstrating:

> [I]nsubordinate behavior by staying after being denied overtime. Additional [sic] by waiting to page before advising MK of issue, CG was openingly[sic] defient[sic]. As result issuing a final warning with 3 day suspension. Any further issues of any type will result in immediate termination.

The dates of the suspension were to be determined.

Gorey presented her side of what had occurred. The Union asked if Lazroff would reconsider and revoke the proposed 3-day suspension. Lazroff replied that he would talk to Kunsman and her superior, Joyce Taylor.

The following day, Lazroff called Kirkpatrick and stated that he had met with Kunsman and Taylor and that the 3-day suspension would stand.[6] Kirkpatrick expressed disappointment,

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[4] GC Exh. 12. It was superseded on June 2, 2004, by the current agreement, GC Exh. 11. All of the provisions germane to this proceeding are the same in both contracts.

[5] GC Exh. 2.

[6] This is reflected in the handwritten notation at the bottom of GC Exh. 2.

and Lazroff responded that Kirkpatrick could file a grievance with him at the third step.[7]

Kirkpatrick prepared a third-step grievance, dated September 14, 2003,[8] which he left at Lazroff's office on about that day. The grievance contended that the suspension was "not based on true facts" and violated several provisions of the collective-bargaining agreement. Kirkpatrick signed as Gorey's representative. There is no grievance signed by Gorey in this record, but because Respondent did not produce her personnel file, I will not make a finding that she never signed a copy. In any case, whether she did or did not sign one is not dispositive of my decision herein.

Thereafter, over a period of months, Lazroff and Kirkpatrick informally discussed settlement of the grievance, sometimes at labor management meetings. Between September and December 2003, when Gorey was actually suspended for 3 days, there were at least 6 such discussions. During their course, Lazroff mentioned that the Hospital's codirector of the cardiac program was interested in getting the discipline overturned. Further settlement discussions occurred in January and February 2004.

Gorey was terminated on March 24, 2004, and the Union filed a grievance thereon. That grievance is relevant here to the extent that the termination was predicated in part on her prior 3-month suspension, as per the Hospital's progressive disciplinary policy. Thus, the outcome of the suspension grievance directly impacted the matter of her discharge.

At the time of Gorey's termination, Respondent and the Union were in the midst of active negotiations for a new contract. During breaks and sidebars at negotiations, Kirkpatrick and Lazroff continued having settlement discussions over Gorey's suspension, as well as her termination. After negotiations were concluded during the first week of June 2004, further discussions took place in the summer.

Lazroff, by letter to the Union dated July 22, 2004, stated that Respondent was not interested in offering Gorey reinstatement and that "We are prepared to arbitrate this matter."[9]

By letters dated August 4 and September 2, 2004, the Union requested a third-step grievance hearing on both suspension and termination grievances and said it would be available on September 28, 2004.[10] The Union subsequently requested rescheduling, and by letter dated November 9, 2004, to Lazroff, Shelko confirmed a December 1, 2004, third-step meeting.[11]

At the December 1 meeting, Lazroff, Taylor, and Kunsman represented the Hospital. At the outset, Shelko asked if management wished to discuss or address any procedural matters, given the time that had elapsed. Lazroff cited a number of reasons for the delay in having the meeting, including negotiations, settlement discussions, and scheduling difficulties. He said that the Hospital was prepared to go forward with the third-step meeting. The Union then presented its case on Gorey's behalf.

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[7] A grievance over Kunsman's conduct normally would have gone to the second step of the grievance procedure, for review by Taylor, Kunsman's supervisor. However, Taylor had already reviewed the situation and upheld Kunsman.

[8] GC Exh. 3.

[9] GC Exh. 17.

[10] GC Exhs. 19 & 22.

[11] GC Exh. 26.

Lazroff, by letter dated December 5, 2004, to Shelko, referenced the December 1 meeting and denied the suspension grievance at Step III.[12] By letter dated December 10, 2004, to Lazroff, Shelko stated that the Union was appealing the grievance to arbitration, the fourth and final step in the contractual grievance procedure.[13] An arbitration hearing was ultimately scheduled for October 4, 2005. The parties continued settlement discussions.

Attorney Clark handled subsequent communications between the Hospital and the Union. By fax dated July 28, 2005, to Shelko, she proposed an offer to resolve the Gorey matter.[14]

However, by letter and fax dated September 8, 2005, to Shelko, she cancelled Shelko's scheduled meeting with Lazro concerning Gorey's arbitration, for the following reason:[15]

> As you are aware, at this time we are preparing for arbitration . . . I am unable to find the original written grievance that should have been filed by the employee in the 3-day suspension issue. I find no evidence that my client waived this requirement or agreed to a late filing.

Further, Clark essentially demanded that the Union provide a written grievance signed by Gorey. This was the first time that Respondent raised the defense that the suspension grievance was invalid. In this regard, Ms. Clark represented at trial that Respondent took the position there was no grievance "as early as September of 2005."[16]

The Union made an information request in a letter dated October 6, 2005, from Shelko to Clark.[17] Also therein, Shelko cited Respondent's unwillingness to meet directly with her and other union representatives, stymieing any settlement discussions since Gorey had authorized Shelko to represent her only in face-to-face meetings. Regarding Clark's September 8 communications, Shelko responded that the Union was not in the possession of an original grievance and suggested that it most likely was filed with the Hospital at the outset of the grievance process.

The Union requested the following:

> (1) Any and all records . . . of calls/pages made to and received by the pagers/beepers assigned to Peg Kunsman, Cheryl Gorey, the on-call manager and Joyce Taylor on the date in question – August 22, 2003.
>
> (2) Copies of any and all computer documentation from the Meditech System and the MOX Meditech System, including the time such documentation was made, from any computer used by Peg Kunsman,

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[12] GC Exh. 4.
[13] GC Exh. 5.
[14] GC Exh. 6.
[15] R Exh. 1.
[16] Tr. 24. An arbitrator likely would address the issue of whether Respondent should be deemed barred by the principle of equitable estoppel from raising the claim that the grievance was invalid, after having treated it as valid for 2 years. I note that had Respondent notified the Union at the outset that Gorey had to sign the grievance, the Union easily could have obtained her signature.
[17] GC Exh. 7.

Cheryl Corey, the on-call case manager and Joyce Taylor on August 22, 2003.

(3) Copies of the schedule for Nursing Unit 2A for August 22, 2003, which show all on-duty staff including the name(s) of the registered nurses who were assigned as charge nurses.

(4) Copies of the schedule for the Emergency Department for August 22, 2003, which show all on-duty staff including the name(s) of those registered nurses who were assigned as charge nurses.

(5) The name of the on-call manager for the afternoon of August 22, 2003.

By fax and letter dated October 17, 2005, from Clark to Shelko, Respondent took the position that "There is no grievance over the three-day suspension. A grievance was not filed, therefore we are cancelling arbitration."[18] Respondent further contended it would not arbitrate the discharge grievance on the basis that it was neither timely filed nor properly signed.

By letters dated October 18 and 25, 2005, respectively, Shelko disputed the contention that no grievance had been filed, and renewed the request for arbitration.[19]

Clark responded by faxes and letters dated October 14 and November 16, 2005.[20] In the former, she stated that investigation and research had revealed no grievance was filed in either case, so there was nothing to arbitrate, and arbitration was cancelled. In the latter, Clark said that Gorey had never filed a grievance over her suspension; the form dated September 9, 2003, signed by Kirkpatrick was not a grievance in compliance with article 6 of the collective-bargaining agreement. She also repeated the position that the termination grievance was also unsigned by Gorey and untimely, and therefore not a valid grievance, either. Accordingly, an arbitrator had no jurisdiction.

The Union reiterated its information request of October 6, 2005, in a letter dated March 31, 2006, from Shelko to Clark, stating, "We require this information to re-evaluate the necessity of and the cost/benefits of pursuing this matter further."[21]

Clark's response, by letter and fax dated April 5, 2006, was: "[T]here is no grievance. I requested that you provide me with evidence of a grievance, and you were unable to do so. The contract requires grievances to be signed by the nurse (Article 6, Section 6.01). There is no document signed by Ms. Gorey."[22]

Article 6, section 6.01 provides that "The written grievance shall be dated and signed by the grievant." At trial, Kirkpatrick cited article 6.05 as providing an exception to this requirement. However, it merely states that the Hospital will recognize a grievance timely initiated by the Union where it can be shown that the affected nurse was unable to file a grievance within the provided time limits because of her incapacitation. Nothing in the record indicates that Gorey fell under this exception.

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[18] GC Exh. 8.
[19] GC Exhs. 27 & 28.
[20] R Exhs. 3 & 2.
[21] GC Exh. 9.
[22] GC Exh. 10.

On the other hand, I credit Kirkpatrick's unrebutted testimony that Respondent has accepted grievances filed by the Union on behalf of nurses when the nurse has not signed it. His testimony was corroborated by documents showing that Karen Thomas, vice president of nursing, accepted grievances not signed by the affected nurse, in July 2003, August 2004, and March 2005.[23] In any event, here Respondent processed both Gorey's suspension and termination grievances, despite its later contention that they were invalid because they were not properly signed, and even went so far as to agree to an arbitration date on them.

## Conclusions of Law

An employer is obliged to supply information requested by a collective-bargaining representative that is necessary and relevant to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). To trigger this obligation, the requested information need only be potentially relevant to the issues for which it is sought. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

Since a bargaining representative's responsibilities include the administration of the collective-bargaining agreement and the processing and evaluating of grievances thereunder, an employer is obliged to provide information that is requested for the handling of grievances. *Acme Industrial*, supra at 436; *Safeway Stores*, 236 NLRB 1126 fn. 1 (1978); *T.R.W., Inc.*, 202 NLRB 729, 730 (1973).

The Union requested records relating to the circumstances surrounding the events on August 22, 2003, that led to Gorey's suspension. Such information was clearly relevant to her suspension grievance and, indirectly, to her later termination grievance.

Respondent contends that because Gorey did not sign the suspension grievance, it was invalid under the terms of the collective-bargaining agreement and therefore outside the jurisdiction of an arbitrator; in the absence of a valid grievance, Respondent had no obligation to furnish any of the requested information.

On the contrary, the Board held in *Safeway Stores*, supra at 1126 fn.1, that before a union is put to the effort of arbitrating even the question of arbitrability, it has a statutory right to potentially relevant information to decide if the underlying grievance has merit and whether it should be pursued at all. See also *Pulaski Construction Co.*, 345 NLRB No. 66 (2005); *Boden Store Fixtures*, 342 NLRB No. 68 (2004). As the Union indicated in its March 31, 2006, letter and at trial, after Respondent declared the grievance invalid, the requested information was needed to determine whether to file a lawsuit in Federal court to compel arbitration. By not providing such information, Respondent precluded the Union from having all facts necessary to weigh the merits of the grievance and decide whether to invest its time and money in filing such.

Respondent further contends that because the 6-month statute of limitations ran on the Union's right to compel arbitration in Federal court, the information request became irrelevant, and the Respondent therefore no longer had any obligation to comply. However, the information request was made well before any such statute of limitations ran. To allow Respondent to withhold information necessary for the Union to make the decision whether to file suit, and then to avoid having to provide the information because the Union did not do so, would be the height of circular reasoning.

[23] GC Exhs. 13(A), 15(B), and 16(A).

In sum, the information sought by the Union related to its duty to represent Gorey in her suspension and later termination grievances and was necessary for the Union to determine how to proceed in terms of arbitration. By failing and refusing since October 17, 2005, and continuing to date, including on April 5, 2006, to furnish that information to the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

## Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish information the Union requested that related to the suspension and later termination of bargaining-unit employee Cheryl Gorey, Respondent failed and refused to furnish information that was necessary and relevant for the Union's performance of its duties as collective-bargaining representative, and Respondent thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

## Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[24]

## ORDER

Respondent, Saint Vincent Charity Hospital of Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish information the Ohio Nurses Association, a/w American Nurses Association/United American Nurses (the Union) requests that is necessary and relevant for the Union's performance of its duties as the exclusive collective-bargaining representative of unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[24] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Provide the Union with the information it has requested since October 6, 2005, relating to the suspension and later termination of employee Cheryl Gorey.

(b) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 17, 2005.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. August 21, 2006.

Ira Sandron
Administrative Law Judge

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to provide the Ohio Nurses Association, a/w American Nurses Association/United American Nurses (the Union) with information it requests that relates to the suspension and later termination of an employee it represents, or otherwise is necessary and relevant for the Union's performance of its duties as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act, as set forth at the top of this notice.

WE WILL furnish the Union with information it requests that relates to the suspension and later termination of an employee it represents, or otherwise is necessary and relevant for the Union's performance of its duties as your collective-bargaining representative.

SAINT VINCENT CHARITY HOSPITAL
OF CLEVELAND, OHIO

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Federal Building, Room 1695

Cleveland, Ohio 44199-2086

Hours: 8:15 a.m. to 4:45 p.m.

216-522-3716.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 216-522-3723.